

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Acceleration of Broadband
Deployment Expanding the Reach and Reducing
the Cost of Broadband Deployment by Improving
Policies Regarding Public Rights of Way and
Wireless Facilities Siting

WC Docket No. 11-59

**COMMENTS OF
THE CITY OF DETROIT
MICHIGAN MUNICIPAL LEAGUE
MICHIGAN TOWNSHIPS ASSOCIATION
AND
PROTEC**

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July 18, 2011

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SUMMARY

A decade ago Michigan addressed the right of way matters described in the Notice of Inquiry (NOI). The result was legislation, commonly known as the Metro Act,¹ which provides a comprehensive, statewide solution that streamlines use of the rights of way by broadband and telecommunications providers. For such providers the Metro Act assures:

- Timely access to the rights of way,
- A standard statewide application form,
- Standard, statewide permit forms for use of the rights of way, and
- Uniform statewide fees.²

The Metro Act, application form and permit forms were worked out collaboratively by the parties who would benefit and implement them and addressed the specific legal and factual situation present in Michigan. Because Michigan has already addressed the right-of-way matters raised in the NOI there is no need for Federal action as to such matters in Michigan.

To be more specific, the Metro Act and its related documents addressed the goal of streamlining broadband and telecommunications provider access to the public rights of way in the context of the unique issues present in Michigan. These included state constitutional and regulatory issues, claims by ILEC's of "grandfathered" rights to use the rights of way, and nearly a decade of litigation which had failed to resolve the fees, terms and conditions for provider use of the rights of way. Key elements of the Metro Act included agreement on a standard, statewide

¹ Metropolitan Extension Telecommunications Rights-of-Way Oversight Act, Mich. Comp. Laws Ann. §§ 484.3101 et seq. ("Metro Act" or "the Act").

² Michigan's uniform fees were commented on favorably by the Commission a year ago in *Omnibus Broadband Initiative, FCC, Connecting America: The National Broadband Plan* (2010) ("National Broadband Plan") at 113.

application form for use of the rights of way; standard forms of permits for provider use of the rights of way (commonly called Metro Act permits); *based upon the forms themselves having been agreed to* a short time frame (45 days) for municipalities to act on applications³ (with immediate, quick MPSC resolution of any disputes);⁴ and a uniform fee, generally 5 cents foot/year,⁵ for use of the rights of way. The Metro Act specifies how the fees paid are annually distributed to municipalities, using a distribution mechanism that ensures that communities with higher costs get a greater share of the Metro Act revenues.

This result was worked out in lengthy State supervised negotiations by the affected parties - - providers and their legal staffs and right of way staffs; municipal managers, attorneys and right of way engineers; regulators - - to reach a comprehensive result which addressed the many and varied actual issues of usage and implementation that are involved.

The City of Detroit, the Michigan Municipal League, the Michigan Townships Association and PROTEC were participants in this process and support (and supported) the result. Based on Michigan's experience, they believe that the right of way matters raised in the NOI have to be (and in many cases have been) addressed at most on a state by state basis, not by this Commission.

³ Mich. Comp. Laws Ann. § 484.3115(3).

⁴ The MPSC must rule on any disputes within 60 days and "may order that the permit be temporarily granted pending resolution of the dispute." Mich. Comp. Laws Ann. § 484.3106(2). In addition, the MPSC may grant emergency relief in as little as 10 days. Mich. Comp. Laws Ann. §§ 484.3106(3), 484.3118(1) and 484.2203.

⁵ Mich. Comp. Laws Ann § 484.3108(4).

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I. INTRODUCTION

A. Michigan Has Resolved the Issues Identified in the NOI, There is No Need for

Federal Action: A decade ago Michigan addressed the right-of-way matters described in the NOI⁶. The result was legislation, commonly known as the Metro Act,⁷ which provides a comprehensive, statewide solution that streamlines use of the rights-of-way by broadband and telecommunications providers. For such providers the Metro Act assures:

- Timely access to the rights-of-way,
- A standard statewide application form,
- Standard, statewide permit forms for use of the rights-of-way, and

⁶ *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, FCC 11-51, WC Docket No. 11-59, Notice of Inquiry (April 7, 2011) ("NOI").

⁷ Metropolitan Extension Telecommunications Rights-of-Way Oversight Act, Mich. Comp. Laws Ann. §§ 484.3101 et seq. ("Metro Act" or "the Act").

- Uniform statewide fees.⁸

The Act, application form and permit forms were worked out collaboratively by providers, municipalities and business groups under the leadership of Governor John Engler and the Michigan Public Service Commission (MPSC or Michigan Commission). They were thus worked out by the parties who would benefit and implement them; addressed the specific legal and factual situation present in Michigan; and were accompanied by a comprehensive educational outreach program.

Because Michigan has already addressed the right-of-way matters raised in the NOI there is no need for Federal action as to such matters in Michigan.⁹

To be more specific, the Metro Act and its related documents addressed the goal of streamlining broadband and telecommunications provider access to the public rights-of-way in the context of the unique issues present in Michigan. These included state constitutional and regulatory issues,¹⁰ claims by ILEC's of "grandfathered" rights to use the rights-of-way, and nearly a decade of litigation which had failed to resolve the fees, terms and conditions for provider use of the rights-of-way. Key elements of the Metro Act¹¹ included agreement on a standard, statewide application form for use of the rights-of-way; standard forms of permits for

⁸ Michigan's uniform fees were commented on favorably by the Commission a year ago in *Omnibus Broadband Initiative, FCC, Connecting America: The National Broadband Plan* (2010) ("National Broadband Plan") at 113.

⁹ As set forth below, and in other municipal comments, *inter alia*, the Commission lacks the authority to take such action.

¹⁰ These principally related to the jurisdiction and division of authority between the state and local units of government over the rights-of-way and regulation of providers.

¹¹ For convenience, the term Metro Act is used to also include the application form and permit forms, which were both approved in the Metro Act and had previously been approved by the MPSC. Mich. Comp. Laws Ann. § 484.3106(1).

such use (commonly called Metro Act permits); *based upon the forms themselves having been already agreed to by all parties* a short time frame (45 days) for municipalities to act on applications¹² (with immediate, quick MPSC resolution of any disputes);¹³ and a uniform fee, generally 5 cents foot/year,¹⁴ for use of the rights-of-way.

The resulting legislation was worked out in lengthy State supervised negotiations involving the actual "worker bees" at the affected parties - - providers and their legal staffs and right-of-way staffs; municipal managers, attorneys and right-of-way engineers; regulators - - to reach a comprehensive result which addressed the many and varied issues of usage and implementation that are involved.

The City of Detroit, the Michigan Municipal League, the Michigan Townships Association and PROTEC were participants in this process and support (and supported) the result. Based on Michigan's experience, where the factual and legal situations were very state-specific and resulted in an equally state-specific solution, Detroit, the Michigan Municipal League, the Michigan Townships Association and PROTEC believe that the right-of-way matters raised in the NOI have to be (and in many cases have been) addressed at most on a state by state basis, not by this Commission.

B. Commentators: These comments are filed jointly by the City of Detroit, the Michigan Municipal League, the Michigan Townships Association and PROTEC. Between them these parties represent all local government entities in Michigan.

¹² Mich. Comp. Laws Ann. § 484.3115(3).

¹³ The MPSC must rule on any disputes within 60 days and "may order that the permit be temporarily granted pending resolution of the dispute." Mich. Comp. Laws Ann. § 484.3106(2). In addition, the MPSC may grant emergency relief in as little as 10 days. Mich. Comp. Laws Ann. §§ 484.3106(3), 484.3118(1) and 484.2203.

¹⁴ Mich. Comp. Laws Ann § 484.3108(4).

Specifically, the City of Detroit is the largest city in the State of Michigan, and has the most extensive (in terms of miles of streets), most complicated and most expensive public rights-of-way in the State, as well as the largest number of broadband and telecommunications providers using them.

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is to improve local government and administration through cooperative effort. Its membership is comprised of some 521 Michigan local governments.

The Michigan Townships Association promotes the interests of 1,242 townships by fostering strong, vibrant communities; advocating legislation to meet 21st century challenges; developing knowledgeable township officials and enthusiastic supporters of township government; and encouraging ethical practices of elected officials who uphold the traditions and unique characteristics of township government and the values of the people of Michigan.

PROTEC is an organization of Michigan cities interested in protecting their citizens' governance and control over public rights-of-way, and their right to receive reasonable compensation from the utilities that use public property.

II. LACK OF COMMISSION LEGAL AUTHORITY:

The Federal Communications Commission (FCC or Commission) lacks the legal authority to create Federal rules regarding telecommunications provider use of the public rights-of-way. The cases under and legislative history of Section 253 of the Communications Act are clear: Providers have to show a specific case of *actual or effective prohibition* of their use of the rights-of-way to have a prima facie case under Section 253. 47 USC § 253 (a).

Congress was emphatic that the FCC was not to become a national right-of-way authority, forcing municipal officials from across the nation to lobby and litigate in Washington, D.C. on the control and usage of their streets. Instead, Congress specified that all right-of-way matters under Section 253 must be resolved in local courts. *See* 47 USC § 253 (d), which only gives the Commission authority over disputes under subsections (a) and (b), *not* those under subsection (c) relating to right-of-way matters.

Relatedly, the U.S. Supreme Court has held that the takings clause of the Fifth Amendment prevents the Federal government from taking *state or local government property* as well as private property without just compensation. *See, e.g.--United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (holding the City of Duncanville, Texas entitled to just compensation as a result of the United States' condemnation of a sanitary landfill owned by the city). This prevents the Commission from reducing or invalidating the fees paid under the Metro Act, which the Michigan legislature in the Metro Act set well below the cost of providing the rights-of-way used by broadband and telecommunications providers.

Other municipal comments, such as those of the National League of Cities *et al.* and Coalition of Texas Cities, address the issue of lack of Commission legal authority in detail. Detroit, the Michigan Municipal League, the Michigan Townships Association and PROTEC strongly and unequivocally support this position, and do not repeat the legal analysis here solely to avoid needless repetition.

III. MICHIGAN'S METRO ACT:

A. Introduction to Metro Act: In 2002, Michigan revised its laws relating to broadband and telecommunications providers obtaining local permission to use the rights-of-way

for their lines by enacting what is commonly known as the Metro Act. The following pages describe the Metro Act and its unique background and result.

B. Purpose, Background, Problems Act Addressed: The Metro Act streamlines and simplifies access to the public rights-of-way in Michigan by broadband and telecommunications providers. As the Metro Act states, its purposes are, *inter alia*, to:

"(d) Streamline the process for authorizing access to and use of public rights-of-way by telecommunication providers.

(e) Ensure the reasonable control and management of public rights-of-way by municipalities within this state.

(f) Provide for a common [uniform] public rights-of-way maintenance fee applicable to telecommunication providers."¹⁵

Prior to the Metro Act, most incumbent phone companies (ILECs) claimed grandfathered franchises from the 1800's and refused to obtain municipal permits¹⁶ to use public rights-of-way or pay fees for their use. However, new telecommunications companies (CLEC's), who provided desired competition, did obtain permits and pay fees. Permit problems were exacerbated by the uncertainty (which years of litigation had not resolved) on the fees and provisions which municipalities could require.¹⁷

¹⁵ Mich. Comp. Laws Ann. § 484.3102(2).

¹⁶ Local nomenclature in Michigan varies; as used in these comments, "permit" is used to mean the basic legal approval for a provider to use municipal streets for its lines, whether styled as a franchise, permit, consent agreement, or otherwise.

¹⁷ Under the laws in effect prior to the Metro Act, fees for telecommunications providers had to be cost-related and generally were charged on a per foot basis – e.g., 10 cents per foot of right-of-way used per year. But even though it was clear that fees were to be tied in some respects to cost, it was not clear how costs were to be accumulated, allocated, or reduced to fees. See *TCG Detroit v. City of Dearborn* 261 Mich App 69; 680 NW 2d 24 (2004). Years of litigation about the meaning and extent of the prior law, to the frustration of all involved did not answer the question as to what fees could be charged. See, e.g. *Coast to Coast Telecommunications, Inc. v. City of Birmingham*, Michigan Public Service Commission Case U-12354 (Oct. 24, 2000).

All groups wanted a resolution to the problem: Then Governor John Engler and business groups principally hoped that a resolution would aid education and economic growth. Municipalities shared these goals, and in addition wanted to resolve uncertainties, stop the litigation and legal fees, and reach an agreeable solution. Providers predominantly wanted a uniform fee and permit structure and regulatory framework. The resulting act and related documents were negotiated and supported by municipalities, providers, Governor Engler, business groups and many others.

The Metro Act, like the issues it addresses, is complex and detailed. The Act takes over 10 pages and 7,700 words in order to adequately cover the many issues presented. In addition, the MPSC-approved permits for use of the rights-of-way the Act endorses are approximately 16 pages long, inclusive of definitions and the like. These stark facts are indicative of the complexity of the issues involved. A summary follows.

C. Metro Act Permit Required: Under the Metro Act, all broadband and telecommunications providers (including incumbent providers claiming grandfathered franchises)¹⁸ must obtain a right-of-way use permit – a Metro Act permit – from each municipality whose streets they use for their lines.¹⁹ In many respects this is the heart of the Metro Act, as the detailed requirements tend to flow from this requirement that all providers

¹⁸ Mich. Comp. Laws Ann. § 484.3105(2).

¹⁹ Mich. Comp. Laws Ann. §§ 484.3105(1) and (2). But to avoid constitutional and other problems, permits which providers had obtained from local municipalities under the legislation preceding the Metro Act were "grandfathered", i.e., deemed to satisfy the Metro Act until they expire, although in general their fee provisions are superseded by the five cent fee provided under the Metro Act. Mich. Comp. Laws Ann. §§ 484.3105(1) ("Authorizations or permits previously obtained from a municipality under section 251 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2251, satisfy the permit requirement of this section").

obtain this permit. Cable company franchises meeting certain minimum requirements are deemed to satisfy the Metro Act's permit requirement.²⁰

Please note that in many jurisdictions a Metro Act "permit" would be called a "franchise", in that it provides legal permission for a provider to use the rights-of-way, but not construction approval (in many states called a "permit") for specific construction or projects. This preserves local management and control of the rights-of-way, as is discussed more below, particularly in Section II.H.

D. Standard Application Form: A standard statewide form²¹ to apply to a municipality for use of the rights-of-way was negotiated between providers and municipalities,²² was approved in the Metro Act by the legislature and had previously been approved by the Michigan Public Service Commission (MPSC).²³ It requires basic information about the applicant, what type of service it will be providing, which streets it will use for its initial lines, its construction

²⁰ Mich. Comp. Laws Ann. § 484.3108(11) ("A cable franchise or consent agreement from a municipality that allows the municipality to seek right-of-way related information comparable to that required by a permit under this act and that provides insurance for right-of-way related activities shall satisfy any requirement for the holder of the cable franchise or consent agreement or its affiliates to obtain a permit to provide information services or telecommunications services in the municipality").

²¹ The Metro Act/MPSC-approved application and permit forms are on the MPSC web site, <http://www.dleg.state.mi.us/mpsc/comm/rightofway/rightofway.htm>.

²² See, e.g. *In re McLeodUSA*, discussed below, which describes how "in a collaborative process involving participating providers and municipalities, the [M]PSC subsequently created two "standard" or "stock" [Metro Act] permit forms, a "unilateral" form and a "bilateral" form", 277 Mich.App. 602 at 605, 751 N.W.2d 508 (2008).

²³ Mich. Comp. Laws Ann. § 484.3106(1) ("[T]he [Michigan Public Service] commission shall prescribe the form and application process to be used in applying to a municipality for a permit under section 15 and the provisions of a permit issued under section 15. The initial application forms and, unless otherwise agreed to by the parties, permit provisions shall be those approved by the [Michigan Public Service] commission as of August 16, 2001") (emphasis supplied). The August 16 date was approximately eight months prior to the passage of the Metro Act in the spring of 2002.

schedule, financial information (unless previously approved by the State), information on who will build and maintain the lines, addresses for the location of local offices and of engineering plans, and insurance. In the application, the provider can request permission to use one, some or all public rights-of-way in a municipality.²⁴

The parties can vary the application form (with disputes going to the MPSC).²⁵

E. Quick Action on Permit Applications: Municipalities must act on an application within 45 days,²⁶ and must notify the MPSC of each grant or denial.²⁷ *A critical point is that this time limit was only possible because the application form and permit forms had already been worked out, agreed to and approved.* As mentioned, Metro Act permits do not authorize a permittee to perform any specific construction in the rights-of-way. The permits authorize the use of the rights of way and are necessary because such local consent is required under the Act and Michigan Constitution. A critical point is that control and management of the rights-of-way through the construction permitting process is left to municipalities, as discussed in Section II.H.

²⁴ As one example of practical input into the application form, information on the type of service to be provided was required at the suggestion of municipal representatives based on their knowledge that local legislators, when faced with an application, will often ask the question "what type of service will you be providing". Although providers argued that technically this was not relevant to the usage of the rights-of-way, ultimately all agreed it was better (in order to prevent questions, disputes and issues which could complicate or delay the grant of permits at the local level) to provide this information in the application form. However, it appears *only* there, it does not appear in the actual permit.

This illustrates the importance of having documents worked out by the actual parties involved.

²⁵ Mich. Comp. Laws Ann. § 484.3106(1).

²⁶ Mich. Comp. Laws Ann. § 484.3115(3).

²⁷ Mich. Comp. Laws Ann. § 484.3106(6).

F. Quick Resolution of Disputes: The Metro Act provides for quick MPSC resolution of disputes about applications or permits to use the rights-of-way. Three related provisions comprehensively address this:

- First, the MPSC must rule on any disputes within 60 days of a complaint being filed.²⁸
- Second, it "may order that the permit be temporarily granted pending resolution of the dispute."²⁹
- Third, the MPSC may grant emergency relief in as little as 10 days under the emergency relief provisions of Michigan's general telecommunications statutes.³⁰

G. Standard Permit Forms: Standard statewide permits authorizing a provider's use of the rights-of-way (Metro Act permits) were also negotiated with providers and approved by the Metro Act and MPSC.³¹ The specific forms of standard permit approved by providers, municipalities, the legislature and MPSC are somewhat detailed and for that reason are not repeated here (as noted above, they are available online). The general principles applicable to them and all such Metro Act permits are set forth in the Metro Act itself, specifically:

- Such permits allow providers "access to and the ongoing use" of public rights-of-way.³²

²⁸ Mich. Comp. Laws Ann. § 484.3106(2).

²⁹ Id.

³⁰ Mich. Comp. Laws Ann. §§ 484.3106(3), 484.3118(1) and 484.2203.

³¹ See footnotes 16, 17 and 18 above. As noted there, the permits are on the MPSC web site, <http://www.dleg.state.mi.us/mpsc/comm/rightofway/rightofway.htm>.

³² Mich. Comp. Laws Ann. § 484.3115(1).

- Permit conditions are limited to those related to such access and use³³ and may not unreasonably be denied.³⁴
- Municipalities retain their authority to manage the rights-of-way and their use, specifically their authority to review and approve a provider's access to and ongoing use and their authority to protect the public health, safety, and welfare.³⁵
- A bond may be required in an amount sufficient to restore the right-of-way when facilities are removed.³⁶

As to the standard forms of permit, they contain information from the application and provide permission to put lines in the streets listed in the application, which (as noted above) can at the provider's option be just one street, many streets, or all streets in a municipality. Once a permit is issued, it can be easily amended to add the right to use additional streets. Parties may vary the standard forms by agreement.

The standard permits are nonexclusive, contain standard provisions on the use of rights-of-way (e.g., no priority in its use, marking, relocation, tree-trimming and the like) as well as insurance and indemnity requirements, require the provision of maps, and run, typically, for a term of five to fifteen years.

H. Construction Approval: A Metro Act permit provides the general authorization or legal approval for a broadband or telecommunications provider to have lines in a municipality's rights-of-way. As for any actual work in the public rights-of-way, the standard forms of Metro

³³ Mich. Comp. Laws Ann. § 484.3115(4).

³⁴ Mich. Comp. Laws Ann. § 484.3115(3).

³⁵ Mich. Comp. Laws Ann. § 484.3115(2).

³⁶ Mich. Comp. Laws Ann. § 484.3115(3).

Act permit require construction approval from the municipality for specific construction projects.³⁷ This helps implement one of the purposes of the Metro Act, namely to "Ensure the reasonable control and management of public rights-of-way by municipalities within this state" (emphasis supplied).³⁸

As mentioned in part in the Metro Act,³⁹ such approvals help assure that there is a minimum of disruption of the rights-of-way, that construction projects are coordinated, that traffic detours or disruptions resulting from the construction are addressed, that there is adequate restoration of the rights-of-way after the construction, and to the extent possible one provider's construction does not cut the lines or pipes of other providers (electric, cable, gas, water, sewer).

Such approvals also help assure compliance with applicable safety codes, in particular the National Electrical Safety Code (NESC), which governs utility line construction in the rights-of-way in Michigan.⁴⁰ The standard form of Metro Act permits require compliance with the NESC.⁴¹

³⁷ See section 4.8 of the standard form of Metro Act permit, which states in part "Before any installation is commenced, Company shall secure all necessary permits, licenses and approvals from Municipality or other governmental entity as may be required by law, including, without limitation, all utility line permits and highway permits. Municipality shall not unreasonably delay or deny issuance of any such permits, licenses or approvals."

³⁸ Mich. Comp. Laws Ann. § 484.3102(2)(e).

³⁹ See, e.g., Mich. Comp. Laws Ann § 484.3107.

⁴⁰ The National Electrical Safety Code is published by the Institute of Electrical and Electronics Engineers, or IEEE, and has been adopted by the MPSC to generally govern all utility line construction in Michigan, see MPSC Rule 460.813. As stated by the IEEE, the code's purpose "is the practical safeguarding of persons during the installation, operation, or maintenance of electrical supply and communication lines, equipment, and associated work practices employed by a public or private electric supply, communications, railway, or similar utility in the exercise of its function as a utility".

⁴¹ Section 4.8 of the standard form of Metro Act permit states that "Company shall comply in all respects with applicable codes and industry standards, including but not limited to

There is no fee for such approvals.

Such construction approvals have not been a problem, although the Metro Act provides for quick MPSC resolution should any disputes arise as to them as well.⁴²

I. Fees: Fees are generally five cents per foot per year.⁴³ They are paid solely by the *owner* of the line (not by persons who may lease or use a line) and are for each foot of right-of-way used.⁴⁴ This satisfies the providers' preference for uniform fees. As noted above, the *National Broadband Plan* commented favorably on this uniform fee structure at page 113. There are significant reductions in the five cent fee for rural⁴⁵ and underserved areas⁴⁶ or for shared usage.⁴⁷ The fees (commonly called Metro Act fees) are paid to a governmental authority, the Metro Authority, which is given the exclusive power to assess fees on telecommunications providers for use of the rights-of-way.⁴⁸

the National Electrical Safety Code (latest edition adopted by Michigan Public Service Commission) and the National Electric Code (latest edition)."

⁴² See Mich. Comp. Laws Ann § 484.3107 which requires an MPSC decision within as little as 15 days and no more than 60 days on any construction approval disputes.

⁴³ Mich. Comp. Laws Ann § 484.3108(4).

⁴⁴ Mich. Comp. Laws Ann § 484.3108(5) ("The fee required under this section is based on the linear feet occupied by the provider regardless of the quantity or type of the provider's facilities utilizing the public right-of-way or whether the facilities are leased to another provider").

⁴⁵ Mich. Comp. Laws Ann § 484.3108(6).

⁴⁶ Mich. Comp. Laws Ann § 484.3108(21).

⁴⁷ Mich. Comp. Laws Ann § 484.3109.

⁴⁸ Mich. Comp. Laws Ann §§ 484.3108(1) and 3103(3).

There are *no other fees* which providers pay, other than a one-time \$500 processing fee paid to a municipality with an initial Metro Act permit application.⁴⁹

The Metro Authority annually distributes Metro Act fees to cities using an existing state highway aid formula, which is designed to take into account the relative amount, cost, and complexity of the rights-of-way within each city.⁵⁰ This distribution mechanism thus ensures that communities with higher costs get a greater share of Metro Act revenues. The fees may only be used by municipalities for right-of-way purposes.⁵¹

The Metro Authority is constitutionally autonomous⁵² so its funds cannot be reallocated by the legislature in annual state budgets.

The Michigan Legislature asked for and received testimony on how the Metro Act fees related to the costs attributable to telecommunications providers using the rights-of-way. The testimony of the two economists who examined this question was that "We have been asked by the Michigan Municipal League to estimate the annual costs incurred by local governments for providing right of way (ROW) to telecommunications providers in the state of Michigan. Our review estimates these costs to be \$86 million annually."⁵³ There was no challenge to or contradiction of these figures.

⁴⁹ Mich. Comp. Laws Ann § 484.3106(4). The fee is waived for providers with lines in a municipality when the Metro Act went into effect. Mich. Comp. Laws Ann § 484.3105(3).

⁵⁰ Mich. Comp. Laws Ann § 484.3111(1)(a). There is a separate, related provision for distributions to townships based upon population, as they do not come under the state highway aid formula.

⁵¹ Mich. Comp. Laws Ann § 484.3110(4).

⁵² See, e.g., Mich. Comp. Laws Ann § 484.3103(1).

⁵³ Singh, Harinder and Nader, John, *Right of Way Costs Incurred by Local Governments in Michigan for Providing Access to Telecommunications Providers*, report and testimony before

The fees currently received by the Metro Authority are just under \$20 million annually, or less than one quarter of the conservative \$86 million annual cost estimated ten years ago of providing the rights-of-way used by telecommunications providers.

Michigan thus illustrates the problem associated with industry calls for “cost-based” rates, and the dangers of adopting a rule that would limit compensation to “cost” (Detroit, the Michigan Municipal League, Michigan Townships Association and PROTEC vehemently disagree that federal law permits such a limitation). Where a state has set a fee through the legislative process, that fee necessarily will represent a resolution of thorny issues associated with right-of-way pricing. To preempt these state resolutions is troubling and constitutionally suspect.

It would be particularly troubling where, as here in Michigan, the state received testimony regarding costs, and the fees recovered are less than the costs that were identified. It is certainly true that a provider could claim that costs estimates are stale, no longer apply and were not subjected to court or agency review; but requiring them replaces the very certainty the Metro Act provided with the uncertainty that characterized the years preceding its adoption,

And Detroit, the League, Townships Association and PROTEC note that provider arguments for "uniform fees" and fees based on "actual costs" are contradictory: The "actual costs" of providing rights of way for broadband or telecommunications provider use vary by municipality and street, and from year to year, and thus inherently are not "uniform". One cannot have both, and as the legislative result and history in Michigan demonstrates, it is highly unlikely that claimed benefits from the former outweigh fee-setting by legislation, especially that which has been endorsed by both municipalities and providers alike.

the Michigan Legislature, January 16, 2002. The authors stressed that they were being conservative, and that the actual costs were likely appreciably larger than \$86 million.

J. Broad, Statewide Support: Among the many groups supporting the Metro Act were the Governor, MPSC, Ameritech (now AT&T), CLEC's, the Michigan Cable Telecommunication Association, AT&T Broadband (now Comcast), the Education Alliance of Michigan, Michigan State Chamber of Commerce, Michigan Manufacturers' Association, Small Business Association of Michigan, Detroit, the Michigan Municipal League, the Michigan Townships Association, PROTEC and others.

K. Implementation: The Commission should be aware that in the months leading up to and then following passage of the Metro Act the MPSC, Michigan Municipal League, Michigan Townships Association, PROTEC and State Bar of Michigan (through its section for municipal attorneys) prepared for and then engaged in a comprehensive, statewide effort to educate municipalities, their elected and appointed officials, attorneys and engineers about the Metro Act and how to comply with it. Providers engaged in similar educational efforts. This was an important part of the successful implementation of the many provisions of the Act.

Thus, for example, the Michigan Municipal League provided an eight page "model ordinance" to its members to implement the Metro Act.⁵⁴ This was essential, as it implemented at the local level many of the substantive requirements of the Act. The Michigan Municipal League also provided a two page "model resolution" for its members which provided direction

⁵⁴ See, e.g. City of Detroit, City Code Chapter 9.5, Article V "Use of Public Ways by Telecommunications Providers". The first section, Section 9.5-5-1, states that "The purpose of this article is to regulate the access to, and ongoing use of, public rights-of-way by telecommunications providers for the telecommunications facilities while protecting the public health, safety, and welfare and exercising reasonable control of the public rights-of-way in compliance with the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act (2002 PA 48)", i.e., the Metro Act.

for their internal operations so as to comply with the Act.⁵⁵ The Michigan Townships Association undertook similar efforts.

L. No Litigation: Since the passage of the Metro Act there has been almost no litigation between municipalities and providers at the Michigan Commission or in the courts regarding telecommunication providers usage of the rights-of-way, permit terms, fees or the like. According to Westlaw there appears to have been only one municipal MPSC case which was appealed to the courts. It involved the legal issue of whether providers had to obtain insurance for harms caused by *underground* construction when at the time they only had *aerial* lines in the municipality in question.⁵⁶ The MPSC ruled that they did not and was affirmed.⁵⁷

M. One Comprehensive Whole: Detroit, the Michigan Municipal League, the Michigan Townships Association and PROTEC stress that the Metro Act, application forms and permit forms were negotiated and worked out by municipalities, providers and regulators over many months as one unified, interrelated whole. To accommodate all the affected parties and issues negotiations at minimum took place in a packed medium sized conference room and occasionally in a large hearing room/small auditorium.

⁵⁵ For example, the resolution required a city's finance department to return to providers any fees which had been received in excess of Metro Act limits. Both documents were reviewed by MPSC staff prior to being distributed.

⁵⁶ *In re McLeodUSA Telecommunications Services*, 277 Mich. App. 602, 751 N.W.2d 508 (2008).

⁵⁷ The other two cases revealed by Westlaw are *SBC Michigan v. Michigan Public Service Commission*, 2005 WL 2895526 (Mich. App. 2005) a challenge to the mediation procedures implemented by the MPSC for, among other things, Metro Act cases, which was rejected for lack of an actual case or controversy, and *In re Sprint Communications*, 277 Mich. App. 311, 745 N.W.2d 520 (2008) affirming an MPSC ruling in a dispute between it and the Metro Authority that providers only owed Metro Act fees for lines owned by them, not for lines they might lease or otherwise use. The Metro Authority has also issued around ten rulings on administrative matters relating to the Metro Act.

This Commission, obviously, was not present at the table when the Metro Act package of procedures and documents was being worked out, and so cannot know the many factors which bear on any one provision. This Commission therefore not only legally cannot, but should not, attempt to modify any portion of the Metro Act or the forms it endorses which were worked out by the parties on the ground in Michigan.

IV. CONCLUSION

A decade ago Michigan addressed and resolved the right-of-way matters described in the NOI. The result was a comprehensive, statewide solution streamlining use of the rights-of-way by broadband and telecommunications providers, which is commonly known as the Metro Act. For such providers in Michigan the Metro Act assures:

- Timely access to the rights-of-way,
- Uniform statewide fees,
- A standard statewide application form, and
- Standard, statewide permit forms for use of the rights-of-way.

The Metro Act, application forms and permit forms for use of the rights of way were negotiated and worked out by the municipalities, providers and regulators involved over many months as one unified, interrelated whole and should not be modified.

Because Michigan has already addressed the right-of-way matters raised in the NOI there is no need for Federal action as to such matters in Michigan, should the Commission have the legal authority to do so (which it does not).

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